



## EMPLOYMENT TRIBUNALS (SCOTLAND)

5

**Case No: 4109218/2021 (A) Preliminary Hearing by Cloud Video Platform on  
18 January 2022**

10

**Employment Judge: M A Macleod**

**Mr H Drummond**

**Claimant  
In Person**

15

**Commissioners for Her Majesty's Revenue  
and Customs**

**Respondent  
Represented by  
Ms Forrest  
Solicitor**

20

25

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**The Judgment of the Employment Tribunal is that the claimant suffers from,  
and at the material time suffered from, a disability within the meaning of  
section 6 of the Equality Act 2010.**

30

### REASONS

35

1. Following a Preliminary Hearing on 29 October 2021, a Preliminary Hearing (Open) was fixed to take place on 18 January 2022 in order to determine whether or not the claimant was at the material time a disabled person within the meaning of section 6 of the Equality Act 2010.
2. The claimant appeared on his own behalf, and the respondent was represented by Ms Forrest.

3. A Joint Bundle of Documents was produced to the Tribunal, upon which reliance was placed by both parties in the hearing.
4. The claimant gave evidence on his own account.

### **Findings in Fact**

- 5 5. Based on the evidence led and information provided the Tribunal was able to find the following facts admitted or proved.
6. The claimant has suffered, over a period of some 20 years, from dizzy spells, which, at their worst, can cause fainting. The episodes of dizzy spells have taken place intermittently over that period, but the incidents of fainting have been much more rare.
- 10 7. In August 2017, the claimant attended a clinic for unrelated blood tests. He fainted on the way to the room where the tests were to be conducted, and suffered a concussive injury, requiring stitches to his mouth. He required to be absent from work for 3 to 4 days thereafter. Following this incident, he informed the DVLA that he had had such an episode, and in May 2018 he was notified by the DVLA that he must not drive. He has received such notification each year since then.
- 15 8. The claimant has been referred to Consultants in Ninewells Hospital, Dundee, for investigation based on a number of tests to try to identify a cause for his dizzy spells and fainting episodes.
- 20 9. The claimant's position is that no specific cause or diagnosis has been identified to categorise his symptoms, though he said in his Disability Impact Statement (1-4) that the neurologist whom he had seen had identified a possible diagnosis of "Non-Epileptic Attack Disorder"; however, this was not confirmed. He refers to his condition under a generic term of "Syncope".
- 25 10. Although the claimant narrated the development of a number of other conditions from which he suffers, none of them were advanced by him as disabilities within the meaning of the 2010 Act.

11. The claimant has not been prescribed any specific medication in relation to the condition of Syncope. He maintains that if he has a dizzy turn, it makes concentration extremely difficult, requiring him either to ask people to wait during conversations while he regroups, or to repeat themselves.
- 5 12. If he feels that he may be about to faint, he requires to steady himself by holding on to something, in order to reduce the risk of collapsing if he does faint, causing injury to himself or to others in the vicinity.
13. He maintains that the most direct effect of his condition is that he has had his licence withdrawn, and is therefore prevented from driving to work in  
10 Edinburgh from Dundee. As a result, his commute is significantly extended. Longer working days have had a negative impact on his ability to concentrate, though the claimant accepts that the medication which he has to take in respect of his Attention Deficit Hyperactivity Disorder (ADHD) aids concentration.
- 15 14. The claimant is unable to take his infant son to nursery on a daily basis around his work. He is also limited in his social interactions with friends and his ability to carry shopping home, given that he is unable to take the car to assist.
15. A number of medical letters were produced in this Hearing.
- 20 16. On 20 October 2017, Dr Spielmann, Consultant Otolaryngologist at Ninewells Hospital, wrote to report that his MRI scan had been reported as normal, which he described as “reassuring and good news” (5).
- 25 17. On 18 January 2018, Dr Jay Golla, a vascular specialist, wrote to the claimant’s GP, Dr Dorward (6) to advise that the claimant had had three episodes of syncope in 20 years, though he had had several episodes of “pre-syncope”. He described the claimant’s symptoms, in the incident when he collapsed at the clinic, as *“He felt light-headed with geometric patterns of vision and also suffered with cold sweating, thumping sensation in his chest with also some pressure on the chest, throat felt like clogged up with*  
30 *trapped wind and felt his vision went as if looking through a kaleidoscope*

*and hard to concentrate. He then fell forward onto his knees and face. He thinks he lost consciousness for not long and then he noticed some blood on the floor through biting his lip. He was indeed disorientated and the nurse at the clinic did not tell him that he was fitting.”*

- 5 18. Dr Golla concluded his report by saying that the symptoms were likely to be due to vasovagal/situational syncope.
- 10 19. On 21 January 2019, Dr Alasdair Mackie, Consultant Physician, reported to Dr Dorward (13) that the claimant had experienced two further significant episodes of collapse with apparent loss of consciousness, one at his desk when he became rather dizzy and noticed his right arm was twitching, though it was difficult to assess the length of time during which he lost consciousness; and the other on a train from Southampton, where he found himself on the floor.
- 15 20. Dr Mackie candidly noted that he was “at a loss to explain these symptoms”. He said they could represent seizure activity, though he was unsure of this.
- 20 21. In April 2019, Dr Kathleen White, Consultant Neurologist, examined the claimant and reported on 4 April (15). She said that the history sounded most suggestive of syncope or possibly non-epileptic attacks. She noted that there was no specific treatment for these events.
- 25 22. She subsequently conducted an EEG, and reported on 8 July 2019 (18) that there were no significant abnormalities detected.
- 30 23. On 27 September 2019, she wrote to Dr Dorward (19) to say that the claimant’s medical history sounded very much more in keeping with syncope and presyncope than non-epileptic attacks.
24. On 25 March 2020, Dr Justein Sim, Consultant Cardiologist, wrote to the claimant’s GP, on this occasion Dr Coull, (24), to advise that the last episode of syncope identified by the claimant was around 18 months before. Dr Sim noted that he can have multiple episodes in one day, and then none for 2 to 3 months. Further investigations were suggested by way of a one-month ECG and an implantable loop recorder.

## Submissions

- 5 25. For the respondent, Ms Forrest reminded the Tribunal that the relevant date upon which to focus in this case is 25 November 2020. She referred me to section 6 of the Equality Act 2010, supplemented by the terms of Schedule 1 to the Act.
- 10 26. The first question posed by Ms Forrest was: does the claimant have a physical or mental impairment? She submitted that the respondent does not consider that the claimant suffers from a physical or mental impairment. She referred to **J v DLA Piper UK LLP 2010 ICR 1052 EAT**, in which it was found that it is not essential for the Tribunal to identify a particular diagnosis so long as it can be demonstrated that there was evidence of an adverse effect on the claimant's abilities.
- 15 27. She argued that there was no adverse effect here on the claimant's abilities. Full episodes of syncope were very infrequent, and pre-syncope events were more frequent but still irregular.
- 20 28. Secondly, does the impairment (if it is an impairment) have an adverse effect on his ability to carry out normal day-to-day activities? She argued that the respondent does not consider that there was any adverse effect. Being an emergency contact does not count as a normal day-to-day activity. He is able to go shopping, look after himself etc. It is not credible that his social interactions have been inhibited by his condition. He can invite people to his home or use public transport to go to meet them.
- 25 29. Thirdly, does the impairment have a substantial adverse effect? Again, Ms Forrest submitted that it did not. He has been able to get to work by public transport. On occasions, before the revocation of his driving licence, he still had to travel by public transport to Edinburgh from time to time. Account has to be taken of the efforts by the claimant to mitigate the effects of his condition, such as public transport, visiting friends with his partner who is able to drive. Although he cannot drive to and from the supermarket
- 30 he can make arrangements for groceries to be delivered, for a small additional cost.

30. Fourthly, Ms Forrest asked if the impairment is a long-term impairment, that is, has it been shown that it has lasted 12 months or would be likely to last 12 months. She pointed out that since there had only been 3 episodes of syncope in the previous 20 years, and none in the 18 months prior to March 2020, this has not been shown to have a long-term adverse effect on his ability to carry out normal day-to-day activities.
31. She also observed that the travel and other restrictions put in place due to the coronavirus pandemic are likely to have restricted the claimant's ability to travel around and visit friends, relations and others.
32. The claimant made a short oral submission on his own behalf.
33. He referred to a decision of the Employment Appeal Tribunal, **Chief Constable of Dumfries & Galloway v Adams 2009 UKEATS/0046/08**, though he acknowledged that this may have been overturned subsequently.
34. With regard to his impairment, he pointed to the bundle of medical letters indicating that over time his treating doctors had been investigating his presentation with syncope and pre-syncope. He said he "would love" for there to have been a formal identification of a root cause, and a treatment to deal with it, but at present neither is available.
35. If he had not had to disclose his condition to the DVLA he would still have a driving licence. With regard to the effects being long-term, he pointed to the terms of Dr Sim's letter of 25 March 2020, in which the sentence before the reference to the last episode of syncope mentions the incidents of pre-syncope. He submitted that the fact that he has periods without incidents does not mean that he is not at risk of having an episode of syncope. It is "just a matter of time" before the next one comes along.
36. He argued that driving, which he is unable to do, is a normal day-to-day activity. His ability to go shopping on his own, or to assist or visit friends at short notice is greatly restricted. This has put a significant strain on his relationship with his partner. He pointed out that in this case, the whole issue surrounds the fact that without his driving licence he could not take up

the job he was seeking. He argued that he does mitigate against the impairment which he suffers from.

37. He submitted that he has suffered substantial adverse effects upon his ability to carry out normal day-to-day activities. He said that his life is made  
5 much harder than it would be if he did not have the impairment.

38. He accepted that Covid-19 meant that people were not going very far. He appreciated that unfairness and unlawfulness are not the same thing, but to say that people with disabilities were not affected is a spectacular unfairness. There were still impacts which were lessened by the pandemic.

10 39. Ms Forrest responded briefly by saying that the reasons why there was a requirement for a driving licence went well beyond what the claimant said. This is set out in the ET3, and she argued that it is not circular to suggest that the claimant could modify his behaviour to avoid substantial adverse impacts upon him.

## 15 **The Relevant Law**

40. Section 6(1) of the Equality Act 2010 (“the 2010 Act”) provides:

*“A person (P) has a disability if –*

- 20 *(a) P has a physical or mental impairment, and*  
*(b) The impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.”*

41. The Tribunal also had reference to the “Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)”, a statutory code issued under section 6(5) of the 2010 Act. Although the Guidance does not impose any legal obligations in itself, nor is it an authoritative statement of the law, it is stated that “any adjudicating body which is determining for any purpose of the Act whether a person is a disabled person must take into account any aspect of this guidance which  
25 appears to it to be relevant”.

30

42. The guidance confirms that to be substantial, the effect must be more than minor or trivial, and also provides that the time taken to carry out an activity, and the way in which an activity is carried out, should be taken into

consideration when compared with the actions of a person who does not have the impairment.

43. Schedule 1 of the 2010 Act provides further assistance in determining the meaning of disability. Paragraph 2 of Schedule 1 states that the effect of an impairment is long term if it has lasted for at least 12 months, or is likely to last for at least 12 months, or is likely to last for the rest of the life of the person affected.

44. In particular, reference is had to Paragraph 2(2) of Schedule 1, which provides “If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur”. The Guidance, at paragraph C5, states: “The Act states that, if an impairment has had a substantial adverse effect on a person’s ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify for the purposes of the Act, in respect of the meaning of ‘long term’”.

45. Paragraph C9 provides: “Likelihood of recurrence should be considered taking all the circumstances of the case into account. This should include what the person could reasonably be expected to do to prevent the recurrence. For example, the person might reasonably be expected to take action which prevents the impairment from having such effects (eg avoiding substances to which he or she is allergic). This may be unreasonably difficult with some substances.

46. The case of **Swift v Chief Constable of Wiltshire Constabulary 2004 ICR 909, EAT** provides useful guidance on this matter. The EAT there emphasised that the question for the Tribunal is not whether the impairment is likely to recur, but whether the substantial adverse effect of the impairment is likely to recur.

47. "Normal day to day activities" are categorised by the Guidance in paragraph D2 and D3, and while it is said not to be possible to provide an exhaustive list of what such activities might be, it states: "In general, day to day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities." D4 confirms that they are not intended to include activities which are normal only for a particular person, or a small group of people. "Normal" should be given its ordinary, everyday meaning.

### **Discussion and Decision**

48. The first question for the Tribunal to determine whether the claimant is suffering from, and was at the material time suffering from, a physical or mental impairment.

49. The respondent disputes this, on the basis that while no formal diagnosis is required, the claimant still requires to demonstrate that he meets the necessary test under section 6. While I accept this proposition, it is necessary to examine what the claimant has presented here. The claimant has provided evidence, both from himself and from treating physicians, which clearly demonstrates that he has, for some time, suffered from a condition for which no formal diagnosis has yet become available, notwithstanding the volume of tests carried out to try to find the root cause of the claimant's problems.

50. What is not in doubt, in my judgment, is that the claimant has, particularly since 2017, suffered from two types of medical problem, namely syncope and pre-syncope. This does not amount to a medical diagnosis, as "syncope" simply means fainting; it is a description rather than any kind of conclusion. What causes the claimant to faint, or to have pre-syncope symptoms amounting to dizzy spells and a sense that he is about to faint, is simply unknown at this stage.

51. The question for the Tribunal is therefore to establish whether or not the condition has an effect on his ability to carry out normal day-to-day activities. I address the nature of that effect below, but in my judgment it can at least be said that the fainting episodes, and their prefatory signs, have had an effect on the claimant's activities. Leaving aside the general uncertainty with which they leave him, not knowing when the episodes may recur, I accept that this condition, whatever its medical diagnosis, has had, and continues to have, an adverse effect on the claimant's daily activities. Ms Forrest argued that that was not the case. I cannot sustain that submission in the face of the evidence. In my judgment, it is therefore a physical impairment suffered by the claimant.

52. Next, then, the question for the Tribunal is to establish whether the condition has an adverse effect on his ability to carry out normal day-to-day activities. The claimant's evidence is that the primary effect is upon his ability to drive. He had to inform the DVLA that he was suffering these episodes, and as a result his driving licence has been suspended. The claimant has then set out a number of effects of that withdrawal.

53. Is driving, of itself, capable of amounting to a normal day-to-day activity? In my judgment, it is. In the **Adams** case, the EAT identified that walking, climbing stairs and driving were plainly normal day-to-day activities. For the claimant, living in Dundee and working in an office in Edinburgh, driving to work means being able to achieve a shorter journey time and therefore can improve his convenience. Clearly, over the period during which the pandemic has held sway, the claimant has not needed to attend the office as he can work remotely, and has done so. Driving, according to his evidence, is also a daily activity for him as he has a young child who requires to be taken and collected from childcare, and for the purposes of shopping and visiting friends and family.

54. It is not for me in this Hearing to consider the wider-ranging effects of the withdrawal of his driving licence – such as upon his employment contract or his partner and their relationship – but in my judgment it would be misguided to find that for the claimant the effect of his condition, which prevents him

from driving, does not have an adverse effect on his ability to carry out normal day-to-day activities.

5 55. With regard to what the claimant describes as the pre-syncope symptoms, these amount to a feeling of dizziness, which can affect him more often than syncope, and can have an adverse effect upon his concentration.

56. The next question for determination, then, is whether the effect of his condition has a substantial, adverse, long-term effect on his ability to carry out normal day-to-day activities.

10 57. "Substantial" means more than trivial. "Long-term" means that it has either lasted for more than one year or is likely to last more than one year, or is a lifelong condition.

15 58. There is no doubt that when he suffers a fainting attack, that is a very significant incident, involving the loss of consciousness with little notice. He described an incident when he was on a train journey, and woke up on the floor of the train, having fainted. That effect upon him, when it happens, is plainly a substantial and adverse effect.

59. It is a condition which has certainly affected him since 2017, if not before, and continues, from time to time, to affect him, and on the face of it might be said to amount to a long-term impairment.

20 60. However, it is plain that the two conditions which he relies upon, syncope and pre-syncope, are intermittent conditions, rather than daily in their incidence.

25 61. The condition is to be treated as having a long-term effect, even if intermittent, if it has had a substantial adverse effect in the past, and is likely to recur.

62. In my judgment, this is a very difficult issue to balance. The claimant's experience of syncope has been very infrequent. He appears to have suffered no more than 3 episodes since 2017, and very few prior to that. The Guidance to the Act, which is not itself statutory but which should be

taken into consideration, suggests that if a condition is likely to recur it should be treated as continuing. The claimant is very anxious that he will suffer further episodes of syncope, and as a result, his driving licence remains suspended. It appears that it will continue to do so for the foreseeable future.

5

63. It is my view that the condition of syncope has had a substantial adverse effect upon the claimant when the episodes occur. It has had an ongoing substantial adverse effect upon his ability to carry out normal day-to-day activities due to his inability to recover his driving licence. There are mitigations which he can take in order to avoid the more acute difficulties presented, and he does them, but in my judgment this is not analogous to the situation where a person requires to avoid certain substances to which he may be allergic. In any event, the claimant simply cannot do what he is not permitted to do, namely driving, and requires to adjust his lifestyle to take account both of that and of the symptoms which he suffers.

10

15

64. What makes this difficult is determining the impact which the pre-syncope symptoms actually have upon him, and the extent to which they affect him. It appears to me, however, that the evidence does demonstrate that the claimant suffers these episodes more frequently than the fainting episodes, and that when they do occur, they have a substantial (more than trivial) effect upon his ability to carry out normal day-to-day activities such as conversations with colleagues, standing and walking, and concentrating. He is also described as having intermittent visual impairments.

20

65. Are these symptoms likely to recur? The claimant plainly believes that they are, since they have been with him for some time. The medical evidence does not contradict that belief, but cannot provide any certainty to the Tribunal since the cause of these episodes is as yet undetected.

25

66. In my judgment, while this is an extremely difficult matter to determine, the claimant has demonstrated that he has suffered, for some years and certainly since 2017, from fainting episodes and pre-syncope incidents which have had a substantial, adverse, recurrent (and therefore long-term)

30

effect upon his ability to carry out normal day-to-day activities. The lack of a firm diagnosis is not itself a barrier to this finding, and the relatively infrequent events which have characterised his syncope do not undermine, in my judgment, the finding that this is a condition which, on the evidence, seems likely to recur, as it has over a period of time.

67. Accordingly, and with some hesitation, it is my conclusion that the claimant is a disabled person within the meaning of section 6 of the Equality Act 2010, and that the case should now proceed accordingly.

10

**Employment Judge: M MacLeod**  
**Date of Judgment: 21 February 2022**  
**Entered in register: 21 February 2022**  
**and copied to parties**

15